No. 83-894

In the Supreme Court of the United States

OCTOBER TERM, 1983

HAROLD LEVY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that he was denied a fair trial by the district court's refusal to immunize and order the deposition, at government expense, of a co-defendant who resided in Canada, and by the alleged suppression of impeachment material relating to a government witness.[1]

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[1]Petitioner also contends (Pet. 25-26) that the classification of phenyl-2-propanone as a Schedule II controlled substance was invalid on the ground that the Drug Enforcement Administration failed to comply with the rulemaking procedures set forth in the Administrative Procedure Act, 5 U.S.C. 553. With respect to this claim, which petitioner concedes he did not expressly raise in the court of appeals, petitioner has adopted the arguments raised in the petition for a writ of certiorari in *Catanese* v. *United States*, cert. denied, No. 83-5005 (Nov. 28, 1983). We rely on our memorandum in opposition to the petition in that case, a copy of which has been sent to petitioner's counsel.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to manufacture and distribute methamphetamine and to distribute phenyl-2-propanone (P2P), in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment and a fine of $5,000. The court of appeals affirmed (Pet. App. A1-A21; 715 F.2d 843).

The evidence at trial showed that from May 1978 through January 1982 co-conspirators Ronald Raiton and Joseph DiSantis, Jr., participated in an "international drug ring that grossed millions of dollars" (Pet. App. A5). During that period, petitioner, an attorney who shared offices in Philadelphia with Raiton and DiSantis, tried to persuade the Drug Enforcement Administration to return 10 gallons of P2P that had been seized from his co-conspirators, falsely claiming that the P2P was not to be used to manufacture methamphetamine (C.A. App. 796a-804a, 1523a-1526a; Pet. App. A6). Petitioner also organized a Canadian company, L-K Forwarding, through which the conspirators imported P2P from abroad for subsequent shipment to the Philadelphia area (C.A. App. 840a-844a, 846a-849a; Pet. App. A6). Between February and September 1979, L-K Forwarding imported at least four 55 gallon drums of P2P (C.A. App. 834a).[2]

2. Petitioner contends (Pet. 14-24) that he was denied a fair trial as a result of the district court's refusal to grant immunity to co-defendant Theodore Karrys and to permit Karrys' deposition in Canada at government expense, coupled with the alleged suppression by the government of

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[2]Petitioner's share of the illicit profits was linked to the conspirators' success in bringing the P2P into the United States, but because his confederates did not give him an accurate accounting of their illicit activities, petitioner received only $75,000 (C.A. App. 834a, 850a).

impeachment material concerning co-conspirator Raiton, who testified for the government at trial. This contention is without merit.

a. Karrys is a Canadian citizen who was indicted along with petitioner. Prior to trial, petitioner filed a motion requesting the district court to grant Karrys immunity and to order that Karrys' deposition be taken in Canada at government expense pursuant to Rule 15 of the Federal Rules of Criminal Procedure (C.A. App. 416a-417a). Petitioner also moved for dismissal of the indictment, alleging that the government had no intention of extraditing Karrys and had indicted him solely to prevent him from testifying as a defense witness (C.A. App. 648a). The government refuted petitioner's assertions, noting that it was in the process of seeking Karrys' extradition (C.A. App. 592a, 646a-647a). The district court denied petitioner's motions (C.A. App. 426a, 648a-649a).

As petitioner candidly concedes (Pet. 17, 22), his motion seeking immunity for Karrys and a deposition order under Rule 15 was "deficient in that it was unsupported by affidavit or other proof" and was therefore "properly denied." He claims (Pet. 17), however, that it became apparent during the trial that Karrys' testimony was "crucial" to his defense and that "the government had no real intention of prosecuting Karrys." In these circumstances, petitioner contends, the district court improperly denied his "renewed" requests for immunity for Karrys and for a deposition order.

Petitioner cites no authority for the proposition that a district court must confer immunity on an unavailable co-defendant at the behest of a defendant seeking to obtain the co-defendant's testimony at his trial. Indeed, the courts of appeals have generally refused to require immunization of defense witnesses even where the witnesses were not under indictment and were physically available to testify at trial,

and this Court has consistently declined to review the issue. See, *e.g.*, *United States* v. *Turkish*, 623 F.2d 769, 771-778 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Klauber*, 611 F.2d 512, 517-520 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Lenz*, 616 F.2d 960, 962-964 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982). Although the Third Circuit, in *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (1980), held that defense witness immunity is available in certain circumstances,[3] that court properly rejected petitioner's immunity claim in this case.

Here, Karrys was a co-defendant who was unavailable either to answer the charges or to testify on behalf of petitioner at the trial. Petitioner's claim (Pet. 17) that the government had no intention of extraditing Karrys is totally unsubstantiated and was expressly contradicted by the prosecutor during the trial proceedings.[4] Moreover, petitioner's bare assertion (Pet. 17) that it became apparent during the trial that Karrys' testimony was crucial to his defense is unfounded. Karrys' allegedly "exculpatory" account relating to the Canadian forwarding company

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[3]In *Smith*, the defendant requested the court to confer immunity on an exculpatory witness, a juvenile subject exclusively to the jurisdiction of local Virgin Islands authorities. The local authorities offered the witness immunity, but, as a matter of prosecutorial courtesy, stated that the offer was conditional on the consent of the United States Attorney, who inexplicably refused to consent.

[4]Petitioner correctly points out (Pet. 23) that Karrys has never been extradited from Canada for trial on the instant indictment. We are informed by the United States Attorney that the government's formal request for Karrys' extradition was denied by the Canadian Government.

organized by petitioner and used by the conspirators as a conduit for European P2P was introduced into evidence through the testimony of a Canadian police officer who had interviewed Karrys (C.A. App. 1843a-1864a). That account, which essentially consisted of Karrys' statement that he dealt only with co-conspirator Raiton regarding the specifics of importing P2P into Canada, and his self-serving claim that petitioner had told him to make sure that possession of P2P was legal in Canada, was not clearly exculpatory and, in fact, corroborated the evidence linking petitioner to the conspiracy. In these circumstances, there is no basis for concluding that the district court abused its discretion by refusing to immunize Karrys.

Petitioner's related claim with respect to the deposition order is similarly without merit and does not present a question of general importance warranting this Court's review. Petitioner relies (Pet. 19-21) on *United States* v. *Wilson*, 601 F.2d 95 (3d Cir. 1979), but that case is clearly distinguishable. The court in *Wilson* held that the defendant was entitled to an order under Fed. R. Crim. P. 15 for the deposition of a witness (not a co-defendant) who was residing in Spain, where that witness had agreed to be deposed and had provided an affidavit that partly exculpated the defendant, and where there were serious questions about the credibility of an accomplice on whose testimony the government's case rested. 601 F.2d at 96-99. In the instant case, by contrast, there was no showing that Karrys could have exculpated petitioner, or even that he was willing to be deposed. On the contrary, in light of petitioner's immunity request for Karrys, it is apparent that Karrys would not have been willing to be deposed (see C.A. App. 417a). Thus, an order for his deposition would have contravened Fed. R. Crim. P. 15(d), which explicitly states that a deposition may not "be taken of a party defendant without his consent."

b. Nor is there any merit to petitioner's bald contention (Pet. 14-16) that the government "suppressed" material that could have been used to impeach co-defendant Raiton's testimony. The government provided the defense in this case with "voluminous" discovery materials (C.A. App. 557a), much of which concerned Raiton's background,[5] and Raiton was subjected to lengthy and and vigorous cross-examination at trial (see C.A. App. 1053a-1414a). At no time did Raiton deny that he had a history of fraud, that he had suborned perjury, that he had bribed judges, that he had millions of dollars in Swiss bank accounts which he hoped the authorities could never reach, and that he had had business dealings with FBI agents and also with a former Assistant United States Attorney who had nothing to do with this case.

The only specific document that petitioner claims the government suppressed (C.A. App. 406a-410a) shows, according to petitioner (Pet. 15), that "only Raiton" dealt with a European company, Iraco, Ltd., that shipped P2P to the conspirators' Canadian forwarding company, L-K Forwarding. The heart of the government's case against petitioner, however, related to his efforts to secure the

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[5]The government's brief in the court of appeals describes some of the materials that were turned over to the defense (Gov't Br. 59-60):

> The defense received affidavits from the prosecutors who participated in the plea agreement negotiations with Raiton. They received the statement of [a] former Assistant United States Attorney * * * regarding the $50,000 loan he had from Raiton. They received the affidavits of the FBI agents who purchased real and personal property from Raiton. They received Raiton's statement to the IRS, and a list of the numerous corporations with which he did business. They received the information known to the government on Raiton's subornation of perjury in other cases. This is by no means an exhaustive list of the material the government provided to the defense.

release of P2P from the DEA's custody and to his organizing L-K Forwarding, rather than to any direct dealings he may have had with Iraco. Thus, there is no reason for this Court to review the conclusion of both courts below that the Iraco document provided no basis for disturbing petitioner's conviction.

Finally, petitioner asserts (Pet. 18, 23) that the government suppressed a tape recording made by a Canadian police officer during an interview of co-defendant Karrys. The Canadian officer testified that the recording in question was not available because of a policy of his department (C.A. App. 1852a). The unavailability of that recording in these circumstances clearly did not constitute a denial of due process by the United States. See *United States* v. *Friedman*, 593 F.2d 109, 120 (9th Cir. 1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984